

## **CHAPTER 34**

### **ADMINISTRATIVE INVESTIGATIONS**

*I believe that the role of the commander's legal advisor is to ensure that the process of gathering facts, of advising on the correct standards for evaluating those facts, and for ensuring the correct application of those standards, is professionally and thoroughly accomplished. Why is this important? I only state the obvious when I tell this audience that we, as lawyers, are expected to get it right. This does not mean a result that is necessarily immune from public criticism, for such criticism is bound to come from some quarter. It means a result that will withstand critical, objective scrutiny.*

**Ms. Judith Miller, General Counsel, U.S. Department of Defense, Federal Bar Association Speech, 8 April 1997**

**I. AR 15-6 INVESTIGATIONS.** AR 15-6, Procedure For Investigating Officers And Boards Of Officers (11 May 88, w/ch1, 30 Sep 96)

- A. FUNCTION: to ascertain facts, make recommendations and report them to the appointing authority
- B. APPLICABILITY: investigations or boards appointed under a specific regulation or directive (e.g., AR 635-200) may make AR 15-6 applicable. In case of conflicting provision, the more specific regulation overrules AR 15-6. Even when not specifically applicable, AR 15-6 may be used a guide but its provisions would not be binding.
- C. TYPES: FORMAL OR INFORMAL
  - 1. Formal:
    - a) Generally used to provide a hearing; extensive due process rights: include president with voting members, recorder, notice to respondent with right to counsel, challenges for cause, entitlement to be present at all open sessions, put on evidence, cross-examine witnesses, make argument.

- b) Example: An administrative separation board conducted UP AR 635-200 is also a formal AR 15-6.

2. Informal:

- a) May be used to investigate individual conduct. Para 1-6: “The fact that an individual may have an interest in the matter under investigation or that the information may reflect adversely on that individual does not require that the proceedings constitute a hearing for that individual.” Para 1-4b(2): Even if the purpose of the investigation is to inquire into the conduct or performance of a particular individual, formal procedures not mandatory unless required by other regulations or by higher authority.
- b) Great flexibility: one IO, proceedings not open to public, statements taken at informal sessions, no right to counsel unless required by Art 31(b), UCMJ; no right to cross-examine, etc.

D. APPOINTING AN INFORMAL 15-6

- 1. Authority: Includes a commander at any level or a principal staff officer or supervisor in grade of major or above. Change 1 authorizes GS-14 agency head or division chief to appoint either formal or informal. Appropriate appointing authority can ratify.
- 2. Method: May be oral but not recommended; written memorandum of appointment preferred. Should specify purpose and scope of investigation and nature of findings and recommendations required. [Model appointment memorandum at Appendix A.] The appointment directive is important. You should work with your Judge Advocate in drafting it.
- 3. Who should be the Investigating Officer? Break the Duty Roster Mindset!
  - a) Commissioned/Warrant Officer/GS-13, senior to soldier whose conduct is under investigation; **best qualified** by reason of education, training, experience, length of service and temperament.

- b) Change 1 requires IO to **consult with OSJA for legal guidance before beginning informal investigation**. IO should continue to consult with OSJA during the entire investigation process, including the development of findings and recommendations.

E. SPECIAL CASES:

1. Only a GCMCA can appoint AR 15-6 if:
  - a) Property damage of \$1M or more;
  - b) Loss or destruction of Army aircraft or missile;
  - c) Injury or illness likely to result in death or permanent total disability.
2. Investigation into fratricide/friendly fire incident forwarded after action to next higher Army HQs for review.
3. Special requirements for Military Whistleblower Protection Act cases, at AR 600-20 (15 Jul 99), paras. 5-8 and 5-12.
4. Special reporting and processing requirements for Sex Harassment cases, at AR 600-20 (15 Jul 99), Appendix E.

F. CONDUCTING THE INVESTIGATION

1. The investigating officer should immediately set a briefing with the advising Judge Advocate officer for the command to understand the rules and legal concerns for AR 15-6 investigations and to set up an investigation plan. Make sure the Investigating Officer gets an Investigating Officer Handbook with checklist [Appendix B].
2. Investigation Plan.

- a) Purpose of the Investigation. What is the timeline? See Appointment Memorandum.
- b) Facts Known
- c) Potential Witnesses
- d) Physical and Documentary Evidence
- e) Possible Criminal or Counter-Intelligence implications? Article 31 warnings?
- f) Any civilian employees as witnesses? Weingarten rights.
- g) Regulations and Laws involved
- h) Order of interviewing witnesses
- i) Chronology

## G. FINDINGS AND RECOMMENDATIONS

### 1. Findings

- a) Clear concise statement of fact readily deduced from evidence in record. Includes negative findings. Should not exceed scope of appointment. Should refer back to evidence gathered in the investigation such as Statement of LTC \_\_, or Photograph 1 at TAB C.
- b) Standard is preponderance of evidence: more likely than not; greater weight of evidence than supports a contrary conclusion. Weight not determined by number of witnesses but by considering all evidence and factors such as demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, other indications of credibility.

- c) Investigating Officer should work with JAG advisor to develop the findings based upon the record of investigation facts and the commander's appointment memorandum.
- 2. Recommendations Consistent with findings. Can be negative, e.g., no further action taken. Make sure they make sense and are supported by the record of investigation. Beware of making mental health evaluation recommendations without evidence in the ROI. See Appendix C, Military Mental Health Evaluation Protection Act.

#### H. ACTION BY APPOINTING AUTHORITY

- 1. Options:
  - a) Approve as is.
  - b) Disapprove, and/or return for additional investigation. May consider all relevant information, even information not considered by IO. Unless otherwise provided by another directive, appointing authority is not bound by findings or recommendations; may take action less favorable than recommended.
  - c) Substitute Findings and Recommendations.
- 2. Legal review before action recommended. Not the same attorney that advised the investigating officer. Required in serious or complex cases:
  - a) Incident being investigated resulted in death or serious bodily injury;
  - b) Where findings & recommendations may result in adverse administrative action or will be relied upon by higher HQs.

#### I. ADVERSE ADMINISTRATIVE ACTION

- 1. No adverse administrative action may be taken by a commander based upon an informal AR 15-6 investigation until:

- a) **Notice** is given to the subject of the investigation of the allegations against them. The subject is given a copy of the investigation subject to any redactions required.
  - b) The subject is given a **reasonable opportunity to rebut** the allegations.
  - c) The **Commander must consider the subject's rebuttal** to the investigation, if submitted in a timely manner, **before taking any adverse action**.
2. The federal courts have routinely upheld adverse administrative actions (based upon AR 15-6 investigation) taken against military members as long as the subject received notice, a chance to rebut the allegations, and command consideration of the rebuttal prior to the adverse action taking place.

#### J. CRITICISMS OF AR 15-6 INVESTIGATION PROCESS

- 1. Subject to abuse: Appearance of whitewash when trying to keep “in-house,” e.g., if used when criminal investigation is more appropriate or too junior of investigating officer appointed.
- 2. Subject to command influence, even unintentional (“signal reading” by IO).
- 3. Lack of IO training and experience: Junior officers appointed. Little guidance on “how to.” Recent changes to overcome this weakness: IO hand-picked as best qualified; coordination with JAG now required for informal investigations; OTJAG publication of an Investigation Guide for Informal Investigations (available at local OSJA).
- 4. Fewer protections for subjects of informal investigation:
  - a) Failure to inform of why under investigation.
  - b) Failure to provide Art 31 rights.

- c) Improper collection of evidence.
- d) No “exclusionary rule” for abuses in investigative process.

## II. **INSPECTOR GENERAL INVESTIGATIONS.** AR 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, 15 MARCH 1994.

- A. IGs should not normally investigate when substantiation of allegations likely to establish criminal misconduct or likely to result in adverse action against individual. Two forms of investigative mechanisms:
  - 1. Investigative inquiries: informal fact-finding process to gather information needed to resolve allegations or issues when investigative techniques are appropriate but circumstances do not merit an IG investigation. Inquiries conducted into “improprieties.” If inquiry develops evidence to substantiate as misconduct, inquiry ends---matter may be referred to CID, or commander may appoint AR 15-6 investigation, or, in rare instances, may become an IG investigation. Only substantiated inquiries need to have a written legal review.
  - 2. Investigations: fact-finding examination by detailed IG into allegations, issues, or adverse conditions to provide the directing authority a sound basis for decisions and actions. Normally address allegations of wrongdoing by an individual. IG must obtain written directive by appointing authority. Written legal review required. Verbal notification required of the commander/supervisor of nature of allegations against the subject/suspect, and verbal notification of the results to commander/supervisor. Should not contain recommendations for adverse action against suspect/subject.
  - 3. What sort of issues are good issues for IG investigations?
    - a) Dereliction of Duty (Non-UCMJ Action)
    - b) Regulatory violations--systematic command problems
    - c) Ethics violations (JER)

d) Conduct Unbecoming An Officer (Non-UCMJ Action)

- B. Benefits: trained, thorough investigators; keeps matter in-house, at least to start with; may otherwise have problem designating good, sufficiently senior AR 15-6 IO who can take the necessary time. Disadvantages: restrictions on release; cannot use evidence for adverse action without TIG authorization; may be necessary to duplicate IG work with AR 15-6 to obtain usable evidence.
- C. Problem: IG investigations and inquiries being used for purposes not originally intended when HQDA command and promotion boards review candidates for suitability. IG records are available within DA for those having need for the record "in the official performance of their duties." AR 20-1, para. 3-4.
- D. Special reporting and investigating requirements for allegations against GO, BG selectee, SES or equivalent.
  - 1. All must be reported to DAIG. Investigation by DAIG or (rarely) DODIG.
  - 2. All allegations, whether eventually substantiated or nonsubstantiated, are maintained in database, for use during background checks.
  - 3. Adverse comments: If unfavorable information obtained which may result in adverse comment in ROI and individual not informed of unfavorable information during investigation, IG will advise of substance before investigation completed and provide opportunity to comment on unfavorable information.
  - 4. Problem: May a General Officer receive a Memorandum of Reprimand based upon a DAIG Investigation (ROI)? Yes. Such use must be authorized by the SA, US of A, CSA, VCSA, or TIG. AR 20-1, para. 3-3. Does the DAIG have to release the entire ROI to the reprimanded General Officer, so he may rebut the allegations raised in the report? OTJAG says no. No obligation to release IG records for personal use, including responding to an adverse action. AR 20-1, para. 3-4a(2).



### III. COMMANDER INQUIRY.

- A. OERs (AR 623-105, para 6-3); NCOERs (AR 623-205, para 1-4, 2-15). When OER/NCOER by subordinate or member of subordinate command may be illegal, unjust, or otherwise violate regulation. Confined to matters relating to clarity of report, its facts, compliance with regulation, and conduct of rated soldier and members of rating chain.
  - 1. As formal or informal as commander thinks appropriate to include telephone and personal discussions. Not an AR 15-6 investigation generally.
  - 2. Inquiry by commander in chain of command above designated rating officials involved in allegations. NCOER: commander (major or above); may appoint an officer senior to designated rating officials involved in allegations to make inquiry.
  - 3. Primary purpose to provide greater degree of command involvement in preventing injustices and errors before they become a matter of permanent record. May also occur after report is accepted at DA but not intended to substitute for appeal.
- B. R.C.M. 303 Preliminary Inquiry (Criminal).
  - 1. Normally this inquiry will consist of review of alleged charges and MPI/CID report of investigation. Not the same as an Article 32 (UCMJ) investigation. Should gather all reasonably available evidence on:
    - a) Guilt or innocence
    - b) Aggravation
    - c) Extenuation and Mitigation.
  - 2. In serious or complex cases, commanders should consult with law enforcement personnel to conduct the inquiry or investigation.

3. A person who is an "accuser" under Article 1(9), UCMJ, may not convene a special or general courts-martial [R.C.M. 504(c)(1)]. Any commander who is a special or general courts-martial convening authority should appoint another officer in the command to conduct the preliminary inquiry and prefer charges, if necessary.
- C. Examination into Article 138 complaint. Art. 138, UCMJ; AR 27-10, chapter 20. GCMCA examines complaint submitted by soldier UP AR 27-10 for any act or omission by a commander that soldier believes to be wrong and for which redress has been requested and refused. Examination may be delegated but not to subordinate of respondent in chain of command and not to person junior in grade. Delegated examinations conducted UP AR 15-6.
- D. Safety & Collateral Investigations-Accidents. AR 385-40.
1. Safety Investigations. The sole purpose is to prevent future accidents. Safety investigations are oriented at discovering what caused accident, e.g., equipment failure, pilot error, or weather conditions. Required for all flight and fratricide/friendly fire accidents. Authorized in other complex accident cases. Safety investigations have priority over collateral investigations. AR 385-40, para. 1-8. Safety investigation results cannot be used as the basis for adverse administrative action or UCMJ action. Safety investigation reports are not to be enclosed or incorporated into any non-safety investigation, including collateral investigations of the same incident. Information gathered from such investigations has restricted release requirements IAW AR 385-40, para. 1.10.
  2. Collateral Accident Investigation. AR 385-40, para. 1-8. Such investigations can be used as the basis for adverse administrative action or UCMJ action. Such investigations often parallel safety investigation facts. Investigators must work with JAG advisor on getting facts, e.g., names of witnesses (but not witness statements), physical evidence from safety investigation team. Safety Board experts not to give opinions of what caused accident to collateral investigators, just factual information. No requirement to follow AR 15-6 procedures, but a good idea.
- E. EO Investigations (AR 600-20, Appendix E). Equal opportunity investigations can be a source for criminal or adverse administrative action. Procedurally, most EO investigations follow the format of AR 15-6. Special requirements as to processing times and reports exist, UP 10 U.S.C. section 1561.

- F. Reports of Survey (AR 735-5). AR 15-6 or collateral accident investigation may be used as substitute for ROS investigation. Survey officers are not required to follow AR 15-6 informal investigation procedures. Survey reports are recorded upon a DA Form 4697, Report of Survey Form. The regulation provides guidance to commanders that survey officers should be senior in rank to the person subject to possible financial liability. Unlike AR 15-6, a survey investigating officer may be an NCO (E-7 or above). Like AR 15-6 informal investigations, for a report of survey to pass legal sufficiency the person subject to financial liability must be given notice of the allegations of negligence, the right to rebut the survey findings in a reasonable period, and to have the rebuttal considered prior to assessing financial liability. A Survey Officer's Guide has been developed by the Army, as DA Pam 735-5 (10 March 1997).

#### **IV. CONCLUSION.**



## **APPENDIX A**

### **Sample AR 15-6 Informal Investigation Appointment Memorandum**



S: 25 March 1999

AFVA-JA (15-6)  
1999

15 March

MEMORANDUM FOR: MAJ Frederick Factfinder, DISCOM Plans Officer, 46<sup>th</sup> Infantry Division (M), Fort Wahoo, Virginia 22330

SUBJECT: Investigating Officer Appointment, G Company, 123d Forward Support Battalion Sex Harassment Complaint

1. Appointment. You are hereby appointed an investigating officer pursuant to Army Regulation (AR)15-6, Procedure for Investigating Officers and Boards of Officers, and Army Regulation 600-20, Command Policy, Chapter 6 (Equal Opportunity Program in the Army), to conduct an informal investigation into allegations of gender bias, and unfair treatment of female soldiers as to promotions and extra duty. A copy of anonymous 6-Boss line message received on 8 March 1999 is enclosed. This investigation is your primary duty and takes precedence over all other duties assigned.

2. Legal Orientation. Before you begin your investigation, you must receive a briefing from the Office of the Staff Judge Advocate, Administrative Law Section. Captain Cheever J. Loophole is your legal advisor. You must have your legal briefing completed no later than 17 March 1999. Call 287-9426 to schedule an appointment. You will consult with Captain Loophole regarding all aspects of this investigation, including developing an investigation plan, determining whether witnesses need to be advised of their rights under the UCMJ, Article 31 or the Fifth Amendment, special procedures for interviewing Department of the Army civilian employees, and preparing findings and recommendations. Captain Loophole will provide you with a 46<sup>th</sup> Division Investigating Officer's Guide and several forms and regulations necessary for you to complete your investigation.

3. Procedures. You are to conduct this investigation using the informal procedures outlined in Chapter 4, AR 15-6. No individual has been named as a respondent at this time. All witnesses will be sworn prior to their interview. You are to thoroughly document all witness interviews in writing, preferably on a DA Form 2823 (Sworn Statement). You will interview all witnesses in person, if practical. If in the course of your investigation you come to suspect that certain people may have committed criminal conduct, you must advise them of their rights under Article 31, UCMJ, or the Fifth Amendment, U.S. Constitution, as appropriate. Witness waivers of their Article 31 or Fifth Amendment rights will be documented on a DA Form 3881 (Rights Warning Procedure/Waiver Certificate). In addition, you may need to provide a witness with a Privacy Act statement before you solicit any information. You are to maintain a daily written chronology of your actions on this investigation. You are strongly encouraged to consult your legal advisor if you have any questions regarding these procedures.

4. Report of Investigation. The report of investigation must include, but is not limited to, findings on the following issues:

a. Whether the G Company, 123d FSB chain of command fairly treats its female soldiers, including if any member of the chain of command has violated any regulations, laws or command policies in its treatment of female soldiers. You must designate which regulations, laws and/or command policies were violated, if any.

b. Whether any female members of G Company, 123d FSB, were subjected to any form of sexual harassment by the chain of command or non-commissioned officers in violation of federal law and AR 600-20, chapter 6, in the past twelve months. Provide specific examples of any such harassment, if it exists within G Company. If you find any incidents of sexual harassment, you must immediately contact your legal advisor and my office, so that this information may be reported pursuant to federal law.

c. Whether any female members of G Company, 123 FSB, were unfairly denied promotion opportunities IAW AR 600-8-19, Enlisted Promotions and Reductions, and the equal opportunity policy of AR 600-20, Change 4, paragraph 6-3 in the past twelve months. Give concrete examples, if you find such conduct.

d. Whether any female members of G Company, 123 FSB, were unfairly assigned extra duties in the past twelve months. You will examine whether the duty roster is run in accordance with AR 220-45; Duty Rosters; whether any assigned "extra training" is conducted in compliance with AR 600-20, paragraph 4-6, and AR 27-10, Military Justice, paragraph 3-3c; and whether any "extra duty" assigned as nonjudicial (Article 15) punishment complies with AR 27-10, paragraph 3-19(b)(5). Give concrete examples, if you find such conduct.

e. Determine if the G Company, 123 FSB officers and noncommissioned officers have exhibited improper attitudes and/or conduct towards female soldiers in the command. Give concrete examples, if you find such conduct.

Provide me with recommendations to resolve any issues or problems raised by your findings. You will consult with your legal advisor in developing your findings and recommendations. Submit your findings and recommendations on a DA Form 1574 (Report of Proceedings by an Investigating Officer/Board of Officers) to the Brigade S-1 no later than 25 March. Submit any requests for modification of this suspense or the scope of your investigation to me, through your legal advisor.

5. Expert Assistance. You should consult with the 123 FSB Equal Opportunity Advisor, and the 46<sup>th</sup> Division Equal Opportunity Officer in determining whether gender bias exists in G Company, 123 FSB.

6. Criminal Misconduct. If you determine through your investigation that possible criminal conduct has occurred, immediately notify your legal advisor before proceeding any further with your investigation.

PAUL E. BRAVEHEART  
COL, AR  
Commanding



**APPENDIX B**

**OTJAG**

**Investigating Officer Handbook**



**ARMY REGULATION 15-6**

**INVESTIGATION GUIDE**

**FOR**

**INFORMAL INVESTIGATIONS**

**JANUARY, 1997**

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## INTRODUCTION

### 1. PURPOSE:

a. This guide is intended to assist investigating officers, who have been appointed under the provisions of Army Regulation (AR) 15-6, in conducting timely, thorough, and legally sufficient investigations. It is designed specifically for informal investigations, but some provisions are applicable to formal investigations. It may also be used by legal advisors responsible for advising investigating officers. A brief checklist is included at the end of the guide as an enclosure. The checklist is designed as a quick reference to be consulted during each stage of the investigation. The questions in the checklist will ensure that the investigating officer has covered all the basic elements necessary for a sound investigation.

b. This guide includes the changes implemented by Change 1 to AR 15-6. Many of those changes are significant; consequently, the information in the guide based on the changes is italicized.

### 2. DUTIES OF AN INVESTIGATING OFFICER: The primary duties of an investigating officer are:

- a. to ascertain and consider the evidence on all sides of an issue,
- b. to be thorough and impartial,
- c. to make findings and recommendations warranted by the facts and comply with the instructions of the appointing authority, and
- d. to report the findings and recommendations to the appointing authority.

### 3. AUTHORITY:

a. AR 15-6 sets forth procedures for the conduct of informal and formal investigations. Only informal investigations will be discussed here. Informal investigations are those that usually have a single investigating officer who conducts interviews and collects evidence. In contrast, formal investigations normally involve due process hearings for a designated respondent. Formal procedures are required whenever a respondent is designated.

b. Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. Since no respondents are designated in informal procedures, no one is entitled to the rights of a respondent, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The investigating officer may, however, make any relevant findings or recommendations concerning individuals, even where those findings or recommendations are adverse to the individual or individuals concerned.

c. AR 15-6 is used as the basis for many investigations requiring the detailed gathering and analyzing of facts, and the making of recommendations based on those facts. AR 15-6 procedures may be used on their own, such as in an investigation to determine facts and circumstances, or the procedures may be incorporated by reference into directives governing specific types of investigations, such as reports of survey and line of duty investigations. If such directives contain guidance that is more specific than that set forth in AR 15-6 or these procedures, the more specific guidance will control. For example, AR 15-6 does not contain time limits for completion of investigations; however, if another directive that incorporates AR 15-6 procedures contains time limits, that requirement will apply.

d. Only commissioned officers, warrant officers, or *DA civilian employees paid under the General Schedule, Level 13 (GS 13), or above* may be investigating officers. The investigating officer must also be senior to any person that is part of the investigation if the investigation may require the investigating officer to make adverse findings or recommendations against that person. Since the results of any investigation may have a significant impact on policies, procedures, or careers of government personnel, *the appointing authority should select the best qualified person for the duty based on their education, training, experience, length of service, and temperament.*

## **PRELIMINARY MATTERS**

### **1. Appointing authority.**

a. Under AR 15-6, the following persons may appoint investigating officers for informal investigations:

- any general court-martial convening authority, including those who have such authority for administrative purposes only,

- any general officer,

- a commander at any level,

- a principal staff officer or supervisor in the grade of major or above,

- any state adjutant general, and

- *a DA civilian supervisor paid under the Executive Schedule, SES, or GS/GM 14 or above, provided the supervisor is the head of an agency or activity or the chief of a division or department.*

b. *Only a general court-martial convening authority may appoint an investigation for incidents resulting in property damage of \$1,000,000, the loss or destruction of an Army aircraft or missile, an injury or illness resulting in, or likely to result in, total disability, or the death of one or more persons.*

**2. Appointment procedures.** Informal investigation appointments may be made orally or in writing. If written, the appointment orders are usually issued as a memorandum signed by the appointing authority or by a subordinate with the appropriate authority line. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation and the nature of the findings and recommendations required. If the orders are unclear, the investigating officer should seek clarification. The primary purpose of an investigation is to report on matters that the appointing authority has designated for inquiry. The appointment orders may also contain specific guidance from the appointing authority, which, even though not required by AR 15-6, nevertheless must be followed. For example, AR 15-6 does not require that witness statements be sworn for informal investigations; however, if the appointing authority requires this, all witness statements must be sworn.

**3. Obtaining assistance.** The servicing Judge Advocate office can provide assistance to an investigating officer at the beginning of and at any time during the investigation. Investigating officers should always seek legal advice as soon as possible after they are informed of this duty and as often as needed while conducting the investigation. In serious or complex investigations for which a legal review is mandatory, this requirement should be included in the appointment letter. Early coordination with the legal advisor will allow problems to be resolved before they are identified in the mandatory legal review. The legal advisor can assist an investigating officer in framing the issues, identifying the information required, planning the investigation, and interpreting and analyzing the information obtained. The attorney's role, however, is to provide legal advice and assistance, not to conduct the investigation or substitute his or her judgment for that of the investigating officer. NOTE: *Complex and sensitive cases include*

*those involving a death or serious bodily injury, those in which findings and recommendations may result in adverse administrative action, and those that will be relied upon in actions by higher headquarters.*

**4. Administrative matters.** As soon as the investigating officer receives appointing orders, he or she should begin a chronology showing the date, time, and a short description of everything done in connection with the investigation. The chronology should begin with the date orders are received, whether verbal or written. Investigating officers should also record the reason for any unusual delays in processing the case, such as the absence of witnesses due to a field training exercise. The chronology should be part of the final case file.

**5. Concurrent investigations.** *An informal investigation may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency. Appointing authorities and investigating officers must ensure that investigations do not hinder or interfere with criminal investigations or investigations directed by higher headquarters. In cases of concurrent investigations, investigating officers should coordinate with the other command or agency to avoid duplication of effort wherever possible. If available, the results of other investigations may be incorporated into the AR 15-6 investigation and considered by the investigating officer. Additionally, an investigating officer should immediately coordinate with the legal advisor if he or she discovers evidence of serious criminal misconduct.*

## **CONDUCTING THE INVESTIGATION**

### **1. Developing an investigative plan.**

a. The investigating officer's primary duty is to gather evidence, and make findings of fact and appropriate recommendations to the appointing authority. Before obtaining information, however, the investigating officer should develop an investigative plan that consists of (1) an understanding of the facts required to reach a conclusion, and (2) a strategy for obtaining evidence. This should include a list of potential witnesses and a plan for when each witness will be interviewed. The order in which witnesses are interviewed may be important. An effective, efficient method is to interview principal witnesses last. This best prepares the investigating officer to ask all relevant questions and minimizes the need to re-interview these critical witnesses. As the investigation proceeds, it may be necessary to review and modify the investigative plan.

b. The investigating officer should begin the investigation by identifying the information already available, and determining what additional information will be required before findings and recommendations may be made to the appointing authority. An important part of this is establishing the appropriate standards, rules, or procedures that govern the circumstances under investigation. The legal advisor or other functional expert can assist the investigating officer in determining the information that will be required.

### **2. Obtaining documentary and physical evidence.**

a. The investigating officer may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, and photographs. This information can save valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request should be made early so the investigating officer may continue to work on other aspects of the investigation while the request is being processed. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs, if they will assist the appointing authority.

b. A recurring problem that must be avoided is lack of documentation in investigations with findings of no fault, no loss, or no wrongdoing. It is just as important to back these findings up with documentary evidence as it is to document adverse findings. All too frequently an investigating officer who makes a finding of no fault, no loss, or no wrongdoing, closes the investigation with little or no documentation. This is incorrect. The report of

investigation must include sufficient documentation to convince the appointing authority and others who may review the investigation that the finding of no fault, no loss, or no wrongdoing is supported by the evidence.

### **3. Obtaining witness testimony.**

a. In most cases, witness testimony will be required. Clearly, the best interviews occur face-to-face; but, if necessary, interviews may be conducted by telephone or mail. Because of the preference for face-to-face interviews, telephone and mail interviews should be used only in unusual circumstances. Information obtained telephonically should be documented in a memorandum for record.

b. Witness statements should be taken on DA Form 2823. Legible handwritten statements and/or questions and answers are ordinarily sufficient. If the witness testimony involves technical terms that are not generally known outside the witness's field of expertise, the witness should be asked to define the terms the first time they are used.

c. Although AR 15-6 does not require that statements be sworn for informal investigations, the appointing authority, or other applicable regulation, may require sworn statements, or the investigating officer may, at his or her own discretion, ask for sworn statements, even where not specifically required. Under Article 136, UCMJ, military officers are authorized to administer the oath required to provide a sworn statement; 5 U.S.C. 303 provides this authority for civilian employees. (Statements taken out of the presence of the investigating officer may be sworn before an official authorized to administer oaths at the witness's location.)

d. Investigating officers do not have the authority to subpoena witnesses, and their authority to interview civilian employees may be subject to certain limitations. Prior to interviewing civilians, the investigating officer should discuss this matter with the local Labor Counselor. Commanders and supervisors, however, have the authority to order military personnel and to direct Federal employees to appear and testify. Civilian witnesses who are not Federal employees may agree to appear, and, if necessary, be issued invitational travel orders. This authority should be used only if the information cannot be otherwise obtained and only after coordinating with the legal advisor or appointing authority.

### **4. Rights Advisement.**

a. All soldiers suspected of criminal misconduct must first be advised of their rights. DA Form 3881 should be used to record that the witness understands his or her rights and elects to waive those rights and make a statement. It may be necessary to provide the rights warning at the outset of the interview. In some cases, however, an investigating officer will become aware of the witness's involvement in criminal activity only after the interview has started and incriminating evidence is uncovered. In such case, rights warnings must be provided as soon as the investigating officer suspects that a witness may have been involved in criminal activity. If a witness elects to assert his or her rights and requests an attorney, all questioning must cease immediately. Questioning may only resume in the presence of the witness's attorney, if the witness consents to being interviewed.

b. Note that these rights apply only to information that might be used to incriminate the witness. They cannot be invoked to avoid questioning on matters that do not involve violations of criminal law. Finally, these rights may be asserted only by the individual who would be accused of the crime. The rights cannot be asserted to avoid incriminating other individuals. The following example highlights this distinction.

c. Example: A witness who is suspected of stealing government property must be advised of his or her rights prior to being interviewed. However, if a witness merely is being interviewed concerning lost or destroyed government property in connection with a Report of Survey, a rights warning would not be necessary unless evidence is developed that leads the investigating officer to believe the individual has committed a criminal offense. If it is clear that the witness did not steal the property but has information about who did, the witness may not assert rights on behalf of the other individual.

**5. Scheduling witness interviews.** The investigating officer will need to determine which witnesses should be interviewed and in what order. Often, information provided by one witness can raise issues that should be discussed



with another. Organizing the witness interviews will save time and effort that would otherwise be spent "backtracking" to re-interview prior witnesses concerning information provided by subsequent witnesses. While re-interviewing may be unavoidable in some circumstances, it should be kept to a minimum. The following suggests an approach to organizing witness interviews; it is not mandatory.

- When planning who to interview, work from the center of the issue outward. Identify the people who are likely to provide the best information. When conducting the interviews, start with witnesses that will provide all relevant background information and frame the issues. This will allow the interviews of key witnesses to be as complete as possible, avoiding the "backtracking" described above.

- Concentrate on those witnesses who would have the most direct knowledge about the events in question. Without unnecessarily disclosing the evidence obtained, attempt to seek information that would support or refute information already obtained from others. In closing an interview, it is appropriate to ask if the witness knows of any other persons who might have useful information or any other information the witness believes may be relevant to the inquiry.

- Any information that is relevant should be collected regardless of the source; however, investigating officers should collect the best information available from the most direct source.

- It may be necessary or advisable to interview experts having specialized understanding of the subject matter of the investigation.

- At some point, there will be no more witnesses available with relevant and useful information. It is not necessary to interview every member of a unit, for example, if only a few people have information relevant to the inquiry. Also, all relevant witnesses do not need to be interviewed if the facts are clearly established and not in dispute. However, the investigating officer must be careful not to prematurely terminate an investigation because a few witnesses give consistent testimony.

**6. Conducting witness interviews.** Before conducting witness interviews, investigating officers may consult Inspector General officials or law enforcement personnel such as Military Police officers or Criminal Investigation Division agents for guidance on interview techniques. The following suggestions may be helpful:

- Prepare for the interview. While there is no need to develop scripts for the witness interviews, investigating officers may wish to review the information required and prepare a list of questions or key issues to be covered. This will prevent the investigating officer from missing issues and will maximize the use of the officer's and witness's time. Generally, it is helpful to begin with open-ended questions such as "Can you tell me what happened?" After a general outline of events is developed, follow up with narrow, probing questions, such as "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored once the general sequence of events has been provided.

- Ensure the witness's privacy. Investigating officers should conduct the interview in a place that will be free from interruptions and will permit the witness to speak candidly without fear of being overheard. Witnesses should not be subjected to improper questions, unnecessarily harsh and insulting treatment, or unnecessary inquiry into private affairs.

- Focus on relevant information. Unless precluded for some reason, the investigating officer should begin the interview by telling the witness about the subject matter of the investigation. Generally, any evidence that is relevant and useful to the investigation is permissible. The investigating officer should not permit the witness to get off track on other issues, no matter how important the subject may be to the witness. Information should be material and relevant to the matter being investigated. Relevancy depends on the circumstances in each case. Compare the following examples:

Example 1: In an investigation of a loss of government property, the witness's opinions concerning the company commander's leadership style normally would not be relevant.

Example 2: In an investigation of alleged sexual harassment in the unit, information on the commander's leadership style might be relevant.

Example 3: In an investigation of allegations that a commander has abused command authority, the witness's observation of the commander's leadership style would be highly relevant.

- Let the witness testify in his or her own words. Investigating officers must avoid coaching the witness or suggesting the existence or non-existence of material facts. After the testimony is completed, the investigating officer should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony also should reflect the witness's own words and be natural. Stilted "police blotter" language is not helpful and detracts from the substance of the testimony. A tape recorder may be used, but the witness should be advised of its use. Additionally, the tape should be safeguarded, even after the investigation is completed.

- Protect the interview process. In appropriate cases, an investigating officer may direct witnesses not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. This precaution is recommended to eliminate possible influence on testimony of witnesses still to be heard. Witnesses, however, are not precluded from discussing matters with counsel.

**7. Rules of Evidence:** Because an AR 15-6 investigation is an administrative and not a judicial action, the rules of evidence normally used in court proceedings do not apply. Therefore, the evidence that may be used is limited by only a few rules.

- The information must be relevant and material to the matter or matters under investigation.

- Information obtained in violation of an individual's Article 31, UCMJ, or 5th Amendment rights may be used in administrative proceedings unless obtained by unlawful coercion or inducement likely to affect the truthfulness of the statement.

- The result of polygraph examinations may be used only with the subject's permission.

- Privileged communications between husband and wife, priest and penitent, attorney and client may not be considered, and present or former inspector general personnel will not be required to disclose the contents of inspector general reports, investigations, inspections, action requests, or other memoranda without appropriate approval.

- "Off-the-record" statements are not acceptable.

- An involuntary statement by a member of the Armed Forces regarding the origin, incurrence, or aggravation of a disease or injury may not be admitted.

The investigating officer should consult the legal advisor if he or she has any questions concerning the applicability of any of these rules.

**8. Standard of Proof.** Since an investigation is not a criminal proceeding, there is no requirement that facts and findings be proven beyond a reasonable doubt. Instead, unless another specific directive states otherwise, AR 15-6 provides that findings must be supported by "a greater weight of evidence than supports a contrary conclusion." That is, findings should be based on evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion.

## CONCLUDING THE INVESTIGATION

**1. Preparing Findings and Recommendations.** After all the evidence is collected, the investigating officer must review it and make findings. The investigating officer should consider the evidence thoroughly and impartially, and make findings of fact and recommendations that are supported by the facts and comply with the instructions of the appointing authority.

- Facts: To the extent possible, the investigating officer should fix dates, places, persons, and events, definitely and accurately. The investigating officer should be able to answer questions such as: What occurred? When did it occur? How did it occur? Who was involved, and to what extent? Exact descriptions and values of any property at issue in the investigation should be provided.

- Findings: A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, investigating officers are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, investigating officers should refer to the exhibit or exhibits relied upon in making each finding. Findings (including findings of no fault, no loss, or no wrongdoing) must be supported by the documented evidence that will become part of the report. Exhibits should be numbered in the order they are discussed in the findings.

- Recommendations: Recommendations should take the form of proposed courses of action consistent with the findings, such as disciplinary action, imposition of financial liability, or corrective action. Recommendations must be supported by the facts and consistent with the findings. Each recommendation should cite the specific findings that support the recommendation.

**2. Preparing the Submission to the Appointing Authority.** After developing the findings and recommendations, the investigating officer should complete DA Form 1574 and assemble the packet in the following order:

- appointing order,
- initial information collected,
- rights warning statements,
- chronology, and
- exhibits (with an index).

### **3. LEGAL REVIEW:**

a. AR 15-6 does not require that all informal investigations receive legal review. *The appointing authority, however, must get a legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied on in actions by higher headquarters.* Nonetheless, appointing authorities are encouraged to obtain legal review of all investigations. Other specific directives may also require a legal review. Generally, the legal review will determine:

- whether the investigation complies with requirements in the appointing order and other legal requirements,
- the effects of any errors in the investigation,
- whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence, and

- whether the recommendations are consistent with the findings.

b. If a legal review is requested or required, it is required before the appointing authority approves the findings and recommendations. After receiving a completed AR 15-6 investigation, the appointing authority may approve, disapprove, or modify the findings and recommendations, or may direct further action, such as the taking of additional evidence, or making additional findings.

## **CHECKLIST FOR INVESTIGATING OFFICERS**

### **1. Preliminary Matters:**

a. Has the appointing authority appointed an appropriate investigating officer based on seniority, availability, experience, and expertise?

b. Does the appointment memorandum clearly state the purpose and scope of the investigation, the points of contact for assistance (if appropriate), and the nature of the findings and recommendations required?

c. Has the initial legal briefing been accomplished?

### **2. Investigative Plan.**

a. Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?

b. Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?

c. Does the plan identify information not immediately available and outline steps to quickly obtain the information?

### **3. Conducting the Investigation.**

a. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?

b. Is the information collected (witness statements, MFR's of phone conversations, photographs, etc.) being retained and organized?

c. Is routine coordination with the legal advisor being accomplished?

### **4. Preparing Findings and Recommendations.**

a. Is the evidence assembled in a logical and coherent fashion?

b. Are the findings (including findings of no fault, no loss, or no wrongdoing) supported by the evidence? Does each finding cite the exhibits that support it?

c. Are the recommendations supported by the findings? Does each recommendation cite the findings that support it?

d. Are the findings and recommendations responsive to the tasking in the appointment memorandum?

e. Did the investigation address all the issues (including systemic breakdowns; failures in supervision, oversight, or leadership; program weaknesses; accountability for errors; and other relevant areas of inquiry) raised directly or indirectly by the appointment?

**5. Final Action.**

a. Was an appropriate legal review conducted?

b. Did the appointing authority approve the findings and recommendations? If not, have appropriate amendments been made and approved?

c. Have the necessary taskers been prepared to implement the recommendations?



# APPENDIX C

## Military Mental Health Evaluation Protection Act

### FOR EDUCATIONAL USE ONLY

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PL 102-484, 1992 HR 5006

<< 10 USCA § 1074 NOTE >>

#### SEC. 546. MENTAL HEALTH EVALUATIONS OF MEMBERS OF ARMED FORCES.

(a) REGULATIONS.--Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall revise applicable regulations to incorporate the requirements set forth in subsections (b), (c), and (d). In revising such regulations, the Secretary shall take into account any guidelines regarding psychiatric hospitalization of adults prepared by professional civilian health organizations.

(b) PROCEDURES FOR OUTPATIENT AND INPATIENT EVALUATIONS.--(1) The revisions required by subsection (a) shall provide that, except as provided in paragraph (4), a commanding officer shall consult with a mental health professional prior to referring a member of the Armed Forces for a mental health evaluation to be conducted on an outpatient basis.

(2) The revisions required by subsection (a) shall provide that, except as provided in paragraph (4)--

(A) a mental health evaluation of a member of the Armed Forces conducted on an inpatient basis shall be used only if and when such an evaluation cannot appropriately or reasonably be conducted on an outpatient basis, in accordance with the least restrictive alternative principle; and

(B) only a psychiatrist, or, in cases in which a psychiatrist is not available, another mental health professional or a physician, may admit a member of the Armed Forces for a mental health evaluation to be conducted on an inpatient basis.

(3) The revisions required by subsection (a) shall provide that, when a commanding officer determines it is necessary to refer a member of the Armed Forces for a mental health evaluation, the commanding officer shall ensure that, except as provided in paragraph (4), the member is provided with a written notice of the referral. The notice shall, at a minimum, include the following:

(A) The date and time the mental health evaluation is scheduled.

(B) A brief explanation of why the referral is considered necessary.

(C) The name or names of the mental health professionals with whom the commanding officer has consulted prior to making the referral. If such consultation is not possible, the notice shall include the reasons why.

(D) The positions and telephone numbers of authorities, including attorneys and inspectors general, who can assist a member who wishes to question the referral.

(E) The rights of the member under the revisions required by subsection (a).

(F) The member's signature attesting to having received the information described in subparagraphs (A) through (E). If the member refuses to sign the attestation, the commanding officer shall so indicate in the notice.

(4) The revisions required by subsection (a) shall provide that, during emergencies, the procedures described in subsection (d) shall be followed in lieu of the procedures required by this subsection.

(c) RIGHTS OF MEMBERS.--The revisions required by subsection (a) shall provide that, in any case in which a member of the Armed Forces is referred for a mental health evaluation other than in an emergency, the following provisions apply:

(1) Upon the request of the member, an attorney who is a member of the Armed Forces or employed by the Department of Defense and who is designated to provide advice under this section shall advise the member of the ways in which the member may seek redress under this section.

(2) If a member of the Armed Forces submits to an Inspector General an allegation that the member was referred for a mental health evaluation in violation of the revised regulations, the Inspector General of the Department of Defense shall conduct or oversee an investigation of the allegation.

(3) The member shall have the right to also be evaluated by a mental health professional of the member's own

choosing, if reasonably available. Any such evaluation, including an evaluation by a mental health professional who is not an employee of the Department of Defense, shall be conducted within a reasonable period of time after the member is referred for an evaluation and shall be at the member's own expense.

(4)(A) No person may restrict the member in communicating with an Inspector General, attorney, member of Congress, or others about the member's referral for a mental health evaluation.

(B) Subparagraph (A) does not apply to a communication that is unlawful.

(4) In situations other than emergencies, the member shall have at least two business days before a scheduled mental health evaluation to meet with an attorney, Inspector General, chaplain, or other appropriate party. If a commanding officer believes the condition of the member requires that such evaluation occur sooner, the commanding officer shall state the reasons in writing as part of the personnel record of the member.

(5) In the event the member is aboard a naval vessel or in a circumstance related to the member's military duties which makes compliance with any of the procedures in subsection (b) impractical, the commanding officer seeking the referral shall prepare a memorandum setting forth the reasons for the inability to comply with such procedures.

(d) **ADDITIONAL RIGHTS OF MEMBERS AND PROCEDURES FOR EMERGENCY OR INVOLUNTARY INPATIENT EVALUATIONS.**--(1) The revisions required by subsection (a) shall provide that a member of the Armed Forces may be admitted, under criteria for admission set forth in such regulations, to a treatment facility for an emergency or involuntary mental health evaluation when there is reasonable cause to believe that the member may be suffering from a mental disorder. The revised regulations shall include definitions of the terms "emergency" and "mental disorder".

(2) The revised regulations shall provide that, in any case in which a member of the Armed Forces is admitted to a treatment facility for an emergency or involuntary mental health evaluation, the following provisions apply:

(A) Reasonable efforts shall be made, as soon after admission as the member's condition permits, to inform the member of the reasons for the evaluation, the nature and consequences of the evaluation and any treatment, and the member's rights under this section.

(B) The member shall have the right to contact, as soon after admission as the member's condition permits, a friend, relative, attorney, or Inspector General.

(C) The member shall be evaluated by a psychiatrist or a physician within two business days after admittance, to determine if continued hospitalization and treatment is justified or if the member should be released from the facility.

(D) If a determination is made that continued hospitalization and treatment is justified, the member must be notified orally and in writing of the reasons for such determination.

(E) A review of the admission of the member and the appropriateness of continued hospitalization and treatment shall be conducted in accordance with procedures set forth in the regulations as required under paragraph (3).

(3) The revised regulations shall include procedures for the review referred to in paragraph (2)(E). Such procedures shall--

(A) specify the appropriate party (or parties) who is outside the individual's immediate chain of command and who is neutral and disinterested to conduct the review;

(B) specify the appropriate procedure for conducting the review;

(C) require that the member have the right to representation in such review by an attorney of the member's choosing at the member's expense, or by a judge advocate;

(D) specify the periods of time within which the review and any subsequent reviews should be conducted;

(E) specify the criteria to be used to determine whether continued treatment or discharge from the facility is appropriate;

(F) require the party or parties conducting the review to assess whether or not the mental health evaluation was used in an inappropriate, punitive, or retributive manner in violation of this section; and

(G) require that an assessment made pursuant to subparagraph (F) that the mental health evaluation was used in a manner in violation of this section shall be reported to the Inspector General of the Department of Defense and included by the Inspector General as part of the Inspector General's annual report.

(e) **CONSTRUCTION.**--Nothing in the regulations prescribed under this section shall be construed to discourage referrals for appropriate mental health evaluations when circumstances suggest the need for such action.

(f) **PROHIBITION AGAINST THE USE OF REFERRALS FOR MENTAL HEALTH EVALUATIONS TO RETALIATE AGAINST WHISTLEBLOWERS.**--(1) The revised regulations required by subsection (a) shall provide that no person may refer a member of the Armed Forces for a mental health evaluation as a reprisal for making or preparing a lawful communication of the type described in section 1034(c)(2) of title 10, United States



Code, and applicable regulations. For purposes of this subsection, such communication also shall include a communication to any appropriate authority in the chain of command of the member.

(2) Such revisions shall provide that an inappropriate referral for a mental health evaluation, when taken as a reprisal for a communication referred to in paragraph (1), may be the basis for a proceeding under section 892 of title 10, United States Code. Persons not subject to the Uniform Code of Military Justice who fail to comply with the provisions of this section are subject to adverse administrative action.

(g) DEFINITIONS.--In this section:

(1) The term "member" means any member of the Army, Navy, Air Force, or Marine Corps.

(2) The term "Inspector General" means--

(A) an Inspector General appointed under the Inspector General Act of 1978; and

(B) an officer of the Armed Forces assigned or detailed under regulations of the Secretary concerned to serve as an Inspector General at any command level in one of the Armed Forces.

(3) The term "mental health professional" means a psychiatrist or clinical psychologist, a person with a doctorate in clinical social work or a psychiatric clinical nurse specialist.

(4) The term "mental health evaluation" means a psychiatric examination or evaluation, a psychological examination or evaluation, an examination for psychiatric or psychological fitness for duty, or any other means of assessing a member's state of mental health.

(5) The term "least restrictive alternative principle" means a principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate and therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such placement are warranted by the proposed plan of treatment.

(h) REPORT.--At the same time as the regulations required by this section are revised, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a report describing the process of preparing the regulations, including--

(1) an explanation of the degree to which any guidelines regarding psychiatric hospitalization of adults prepared by professional civilian mental health organizations were considered;

(2) the manner in which the regulations differ from any such civilian guidelines; and

(3) the reasons for such differences.

(j) CONFORMING REPEAL.--Subsection (g) of section 554 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510) is hereby repealed.

## COMMANDERS' CHECKLIST - MMHEPA

\*Developed by CPT Daniel A. Lauretano, 46<sup>th</sup> Graduate Course

**\* =** The Military Mental Health Evaluation Protection Act (MMHEPA), National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546, 106 Stat. 2315, 2416-19 (1992); DoD Instruction (DoDI) 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, (28 Aug. 1997); and DoD Directive (DoDD) 6490.1, Mental Health Evaluations of Members of the Armed Forces, (1 Oct. 1997). *See also* DA Message, 080700Z Mar 96, DAPE-HR-L, subject: Mental Health Evaluations (Clarification)(ALARACT 21/96)(8 Mar. 1996).

**\*1\*** = Paragraph D.3.e. of the DoDD, excludes the following referrals, evaluations and interviews from the procedural requirements of the MMHEPA:

Voluntary self-referrals.

Sanity & competency inquiries in accordance with (IAW) Rules for Courts-Martial 706.

Referrals to Family Advocacy Programs (these normally involve medical assessments and treatment of family members by trained personnel). See DoD Directive 6400.1, Family Advocacy Program, 6.1 (23 Jun. 1997) and Army Regulation 608-18.

Referrals to drug and alcohol abuse rehabilitation programs. These normally take place during the “intake procedures.” Intake procedures require a psychological evaluation to assess the soldier’s need for detoxification and potential for rehabilitation. See DoD Directive 1010.4, Alcohol and Drug Abuse by DoD Personnel, E.3.b(2)(a) (25 Aug. 1980); DoD Instruction 1010.6, Rehabilitation Referral Services for Alcohol and Drug Abusers (13 Mar. 1985); and Army Regulation 600-85, Alcohol and Drug Abuse Prevention and Control Program, para. 3-10 (21 Oct. 1988).

Referrals for diagnostic evaluations made by non-command and non-mental health care providers, and with soldier’s consent.

Non-discretionary evaluations required by regulation or for special duties or occupational classifications. According to para. D.3.e of the DoDD, if a regulation requires a commander to refer a soldier for a mental health evaluation, the referral is not discretionary.

**Examples of non-discretionary referrals** not falling within the DoD procedural requirements and made IAW Army Regulations:

Security Clearance Evaluations IAW Army Regulation 380-67;

Personnel Reliability Program Evaluations IAW Army Regulation 380-67;

Evaluations made IAW Army Regulation 135-178;

Discharge for the good of the service IAW Army Regulation 635-200, para. 1-34b and Chapter 10, and when the soldier requests a medical examination;

Misconduct IAW Army Regulation 635-200, para. 1-34b, and Chapter 14, section III;

Unsatisfactory performance IAW Army Regulation 635-200, para. 1-34b, and Chapter 13;

Homosexuality IAW Army Regulation 635-200, para. 1-34b, and Chapter 15;

**Examples of discretionary command referrals** falling within the DoD procedural requirements when made as part of an administrative elimination are:

Personality disorders IAW Army Regulation 635-200, para. 5-13, when made to determine if the soldier has a personality disorder.

Parenthood IAW Army Regulation 635-200, para. 1-34b, and para. 5-8;

Alien unlawfully admitted IAW Army Regulation 635-200, paras. 1-34b and 5-10;

Concealing arrest record IAW Army Regulation 635-200, paras. 1-34b and 5-14;  
Fight training disqualification IAW Army Regulation 635-200, paras. 1-34b and 5-12;  
Separations IAW Army Regulation 635-200, paras. 1-34b, 5-16 and 5-17;  
Dependency or hardship IAW Army Regulation 635-200, para. 1-34b, and Chapter 6;  
Defective enlistment, reenlistments and extensions IAW Army Regulation 635-200, para. 1-34b, and Chapter 7;  
Pregnancy IAW Army Regulation 635-200, para. 1-34b, and Chapter 8;  
Entry level separation IAW Army Regulation 635-200, para. 1-34b and Chapter 11;  
Conviction by civil court IAW Army Regulation 635-200, paras. 1-34b, 14-5b, and Chapter 14, section II; and  
Failure of body fat standards IAW Army Regulation 635-200, para. 1-34b, Chap. 18.

**\*2\*** = According to Section 546(b)(2)(A) of the MMHEPA, you may only refer a soldier for an inpatient mental health evaluation if an outpatient evaluation is not reasonable IAW the “least restrictive alternative principle.” Section 546(g)(5) of the MMHEPA defines “least restrictive alternative principle” as:

A principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such personnel are warranted by the proposed plan of treatment.

Page 2-1 of the DoDD expands this definition to include,

“Such treatments form a continuum of care including no treatment, outpatient treatment, partial hospitalization, residential treatment, inpatient treatment, involuntary hospitalization, seclusion, bodily restraint, and pharmacotherapy, as clinically indicated.” A mental health care provider should advise you on the appropriate “therapeutic setting and treatment.”

IF IN DOUBT, PRIOR TO MAKING A NON-EMERGENCY INPATIENT REFERRAL, CONSULT YOUR LEGAL ADVISOR.

**\*3\*** = Page 2-2 of the DoDD and the DoDI define a “mental health care provider” (MHCP) as “a psychiatrist, clinical psychologist, a person with a doctorate in clinical social work, or a psychiatric clinical nurse specialist.” The DoDD and DoDI require commander’s to consult with an MHCP before referring a soldier for a mental health evaluation, treatment, or hospitalization falling within the DoD procedural requirements. If no MHCPs are available, the commander must consult with a physician or the “senior privileged non-physician provider present.” Page 2-3 of the DoDI defines a “senior privileged non-physician provider present” as “in the absence of a physician, the most experienced and trained health care provider who holds privileges to evaluate and treat patients, such as clinical social workers, a nurse practitioner, an independent duty corpsman, etc.” You must then document the results of your consultation and provide a copy to the MHCP performing the evaluation.

**\*4\*** = Paragraph D.8. of the DoDD requires you, upon receiving the MHCP’s recommendations, to “make a written record of the actions taken and reasons thereof.” If the MHCP recommends that your soldier be separated from the service and you elect to retain the soldier, you must document your reasons and forward a memorandum to your superior within two business days of receiving the MHCP’s recommendations.

**\*5\*** = Paragraph D.2.c. of the DoDD requires you to refer soldiers for emergency mental health evaluations when one of your soldiers, by acts or words, is likely to cause injury to himself or herself, or others. You must also make an emergency referral whenever you believe your soldier is suffering from a mental disorder. Before making the emergency referral, you must make every effort to consult with an MHCP. If time and the nature of the emergency do not permit you to consult with an MHCP, you must consult with an MHCP at the MTF or clinic where the MHCP will evaluate your soldier. You must explain to the MHCP your reasons justifying the emergency evaluation. You must then document your conversation with the MHCP and forward a copy of the memorandum to the MHCP. If you are unable to consult with an MHCP prior to or at the MTF or clinic, para. F.1.a(5)(e) of the DoDI, allows you to document your reasons for the emergency evaluation and then forward a copy of the memorandum (via facsimile, overnight mail or courier) to the MHCP. This exception is a limited one.

\*6\* = If after the emergency evaluation, an MHCP involuntarily hospitalizes your soldier, in addition to providing the soldier notice of the referral and his or her rights, para. F.2.b(1) of the DoDI requires you to inform the soldier of the “reasons for and the likely consequences of the admission.” Para. F.2.b(2) also requires you to advise your soldier that he or she may call a family member, friend, chaplain, attorney, or IG.

## **SOLDIER'S COUNSEL CHECKLIST**

\*Developed by CPT Daniel A. Lauretano, 46<sup>th</sup> Graduate Course

I. The DoD Directive implementing the Military Mental Health Evaluation Protection Act (MMHEPA) references the Guidelines For Involuntary Civil Commitment<sup>1</sup> (Guidelines) as one source attorneys should use when representing soldiers pending mental health evaluations, treatment or hospitalization. Paragraph E.2 of the Guidelines provides, “for attorneys to assume the proper advocacy role, the attorney must advise the respondent of all available options, as well as the practical consequences of those options . . . the attorney should advocate the position that best safeguards and advances the client’s interest.” In order to best represent the interests of your client, counsel should use the following suggested approach in accordance with paragraph E1-E7 of the Guidelines.

### **II. Review of Non-emergency Outpatient and Inpatient Referral Procedural Requirements.**

A. In order to determine whether the commander complied with the procedural requirements of the MMHEPA and the DoD Directive and Instruction:

First, meet with your client and determine whether the commander informed your client of the reasons for the referral. You can do this by reviewing the “referral and rights” memorandum provided to the soldier. Ensure your client understands the commander's reasons for the referral.

Second, assess whether the commander based the referral on the immediate facts and circumstances of the case (e.g., client’s behavior, client's statements, witness statements, mental health care provider's (MHCP) assessment, etc.). If the commander based the referral on facts and circumstances occurring several days or weeks ago, the referral may be stale and improper. In addition, assess whether the information the commander provided to the MHCP is accurate and complete.

Third, determine whether the commander complied with the consultation requirement. If the commander consulted with an MHCP, contact the MHCP and ensure he or she agreed with the referral. If the commander did not consult with an MHCP, review the “referral and rights” memorandum and determine whether the commander explains his or her reasons for not consulting an MHCP. If the commander failed to comply with the consultation requirement, the referral is procedurally improper.

Fourth, if the referral is for inpatient evaluation, ensure it complies with the “least restrictive alternative principle” (LRAP). The MMHEPA defines the LRAP as:

A principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such personnel are warranted by the proposed plan of treatment.

See National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546(g)(5), 106 Stat. 2315, 2419 (1992).

Fourth, assess whether the commander informed your client of the following rights:

The right to speak with a legal assistance attorney about the propriety of the referral;

The right to speak to a civilian attorney of the client’s own choosing and expense, about the propriety of the referral;

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<sup>1</sup> NATIONAL TASK FORCE ON GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT (Joseph Schneider, et al. eds., 1986). For more information or to order copies of the Guidelines call 1-800-877-1233.

The right to file a complaint with either the DoD or Army IG alleging that the referral was in reprisal for making or preparing a protected communication.

The right to file a complaint with either the DoD or Army IG alleging that the referral for a mental health evaluation was improper.

The right to be evaluated by an MHCP of the client's own choosing and expense.

The right to discuss the referral with an IG, attorney, member of Congress, or others.

The right to seek assistance from the IG, legal assistance office or the chaplain on rebutting the referral.

If the commander failed to notify your client of the above rights, the referral is procedurally improper.

Fifth, determine whether the commander formally requested the evaluation. If the commander failed to formally request the evaluation, the referral is procedurally improper.

### III. Review Client's History and Explore Alternatives.

A. After assessing whether the commander complied with the procedural requirements for the referral, review your client's psychiatric history and explore alternative resolutions to the referral.

First, discuss with your client the facts and circumstances of the referral. While discussing the facts and circumstances of the referral with your client, you should keep in mind that your client may be suffering from a mental disorder or disability. You should, consequently, evaluate your client's information objectively for accuracy and completeness. Ask your client to provide you with names of MHCPs, that have dealt with your client in the past. In addition, ask your client to provide you with names of co-workers, friends, family and other character witnesses.

Second, review your client's medical and any psychiatric records (outpatient and inpatient). In particular, review the client's past psychiatric counselings, treatment and hospitalization.

Third, interview all MHCPs, if any, that examined or treated your client in the past. These MHCPs may provide you insight on possible alternatives to the command referral (e.g., outpatient vs. an inpatient evaluation).

Fourth, interview all witnesses involved with the referral. If the facts and circumstances suggest that the referral is improper, consider presenting these witnesses to the commander, the MHCP, or the reviewing officer to rebut or prevent the referral.

Finally, use information gathered from records, witnesses, MHCPs and your client to explore alternative resolutions to the referral. For example, a counseling session with a chaplain may suffice rather than an outpatient mental health evaluation. Likewise, an outpatient mental health evaluation may be more appropriate than an inpatient evaluation, treatment or hospitalization. Before recommending that your client follow an alternative option, counsel should discuss all alternatives with either the MHCP the commander consulted, or an independent MHCP.

B. After reviewing your client's psychiatric history and exploring alternative resolutions to the referral, explain the effect and any stigma any alternative resolution may have on your client once he or she leaves the Army. For example, the MHCPs negative findings may affect soldier's ability to acquire future employment.

C. If the client consents, discuss the alternative options with the commander and the MHCP consulted, and negotiate an appropriate resolution for your client.

#### IV. Emergency Evaluations, Treatment and Hospitalization.

If your client is being referred for an emergency evaluation, treatment or hospitalization, in addition to taking the above steps, counsel should consider the following issues.

First, determine whether the commander informed your client of the reasons for the emergency referral.

Second, determine whether the commander based his or her reasoning for the emergency referral on the DoD's "clear and reasoned judgment" standard.

Third, if the commander did not consult with an MHCP prior to the referral, determine whether the commander "made every effort" to do so. In addition, was the reason for not consulting with an MHCP documented and a copy provided to the MHCP that performed the evaluation. If the commander did consult with an MHCP, ensure the MHCP concurred with the referral.

Finally, if the MHCP hospitalizes your client, ensure an MHCP reviews the propriety of continued hospitalization within twenty-four hours after admittance.

#### V. Review of Referral, Evaluation and Continued Hospitalization.

A. If an MHCP decides to hospitalize your client, the medical treatment facility (MTF) or clinic commander must appoint an independent medical reviewing officer (RO) within seventy-two hours.

B. Once appointed, the RO must review the propriety of the referral, evaluation and hospitalization. The RO must also assess the propriety of continued hospitalization. Finally, the DoD Directive requires the RO to speak to your client during the review.

C. Since your client has the right to have counsel present and assist the client in the review, counsel should use this opportunity to advance the best interests of the client. Counsel should consider:

1. Presenting witnesses and documentary evidence to the RO suggesting that continued hospitalization is unnecessary.

2. If the RO decides to keep your client hospitalized, ensure the RO specifies when the next review will occur. The MMHEPA and the DoD Directive mandate that the next review occur within five business days.

**SAMPLE COMMANDER'S NOTICE  
TO SOLDIER OF REFERRAL AND RIGHTS**

(Office Symbol)

(Date)

MEMORANDUM FOR \_\_\_\_\_  
(Soldier's name, rank, and SS#)

SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights

References: (a) DoD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.

(b) DoD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.

(c) Section 546 of Public Law 102-484, National Defense Authorization Act for Fiscal Year 1993, October 1992.

(d) DoD Directive 7050.6, Military Whistleblower Protection, 12 August 1995.

1. In accordance with paragraph F.1.a(4) of reference (b), I am referring you to a mental health care provider for a mental health evaluation.

2. I direct you to meet with \_\_\_\_\_ (name & rank of mental health care provider(s))  
at \_\_\_\_\_ (MTF or clinic) on \_\_\_\_\_ (date) at \_\_\_\_\_ hours.



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3. I am referring you for a mental health evaluation because of your behavior and/or statements on \_\_\_\_\_ (date(s)). On the stated date(s), you (brief description of behaviors and statements):

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4. In accordance with paragraph F.1.a(2) of the DoD Instruction 6490.4, before the referral, (on \_\_\_\_\_ (date) I consulted with \_\_\_\_\_ (name, rank, branch of each mental health care provider consulted) from the \_\_\_\_\_ (MTF clinic) about your recent behavior and/or statements and \_\_\_\_\_ (name and rank of each mental health care provider) (did) (did not) concur(s) that a mental health evaluation is necessary) or (I was unable to consult with a mental health care provider because \_\_\_\_\_

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5. In accordance with paragraph F.1.a(4) of reference (b), and reference (a) and (c), you have the following rights:

a. The right to speak with a legal assistance attorney for advice on how to rebut this referral if you believe it is improper.

b. The right to speak to a civilian attorney of your own choosing and expense, for advice on how to rebut this referral if you believe it is improper.

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c. The right to submit to the DoD or the Army Inspector General a complaint that your mental health evaluation referral was a reprisal for making or preparing a protected communication to a statutory recipient. Statutory recipients include members of Congress, an IG, and personnel within DoD audit, inspection, investigation or law enforcement organizations. Statutory recipients also include any appropriate authority in your chain of command, and any person designated by regulation or other administrative procedures to receive your protected communication.

d. The right to submit to the DoD or the Army Inspector General a complaint that your mental health evaluation referral was in violation of reference (a), (b), or (c).

e. The right to be evaluated by a mental health care provider (MHCP) of your choosing and expense, provided the MHCP is reasonably available. If reasonably available, your MHCP must perform the evaluation within a reasonable period of time (not to exceed 10 business days). The evaluation performed by your MHCP will not delay or substitute for an evaluation performed by a DoD mental health care provider.

f. The right to communicate, provided the communication is lawful, with an IG, attorney, Member of Congress, or others about your referral for a mental health evaluation.

g. If applicable, in accordance with 4-2 of the DoD Instruction 6490.4, since you are (deployed) (in a geographically isolated area) because of circumstances related to military duties, compliance with the following procedures \_\_\_\_\_

\_\_\_\_\_ are impractical for the following reasons \_\_\_\_\_.

h. The right, except in emergencies, to have at least two business days before the scheduled mental health evaluation to meet with an attorney, IG, chaplain, friend or family member.

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SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights

6. You may seek assistance from a military or Army employed civilian attorney assigned to the **Legal Assistance Office** located in building number \_\_\_\_\_, Monday through Friday from \_\_\_\_\_ hours to \_\_\_\_\_ hours. You may also call for assistance at \_\_\_\_\_ (phone number).

7. You may seek assistance from the **installation IG** located in building number \_\_\_\_\_, Monday through Friday from \_\_\_\_\_ hours to \_\_\_\_\_ hours. You may call for assistance at \_\_\_\_\_ (phone number). You may also seek assistance from the **DoD IG** at 1-800-424-9098.

8. You may seek assistance from the **Chaplain** located in building number \_\_\_\_\_, Monday through Friday from \_\_\_\_\_ hours to \_\_\_\_\_ hours. You may also call for assistance at \_\_\_\_\_ (phone number).

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Rank/Branch)  
Commanding

I have read, understood and received a copy of this memorandum.

Soldier's signature \_\_\_\_\_ Date \_\_\_\_\_.

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SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights<sup>2</sup>

IF SOLDIER DECLINES TO SIGN

The soldier declined to sign this memorandum containing the notice of referral and notice of soldier's rights because \_\_\_\_\_

\_\_\_\_\_ (e.g., gave no reason, quote reason or otherwise). After the witness signed this memorandum, I provided a copy of this memorandum to the soldier.

Witness's signature \_\_\_\_\_ . Date \_\_\_\_\_ .

Print witness's rank and name \_\_\_\_\_ .

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<sup>2</sup> This sample form was adapted from enclosure 4 of U.S. DEP'T OF DEFENSE, INSTR. 6490.4, REQUIREMENTS FOR MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES, 4-1 to 4-3 (28 Aug. 1997) and modified for Army use.